In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 253

MICHAEL ALLAN MCCOWAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 376 F. 2d 122.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1967. A petition for rehearing was denied on May 9, 1967. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to June 20, 1967, and on June 15, 1967, the petition

was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the verdict that petitioner unlawfully removed a package from, and obstructed, the mails.

2. Whether the prosecutor was guilty of misconduct in cross-examining a character witness.

3. Whether petitioner was otherwise denied a fair trial.

STATUTES INVOLVED

18 U.S.C. 1702 provides:

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. 1708 provides in pertinent part:

> Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository

> for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; * * *
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> Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

After a jury trial, petitioner was convicted in the United States District Court for the Southern District of California on two counts of an indictment charging obstruction of, and an unlawful taking of a package from, the mails in violation of 18 U.S.C. 1702 and 1708. On January 24, 1966, he was sentenced to imprisonment for five years on each count, the terms to run concurrently (R. 63).[1] The court of appeals affirmed (Pet. App. A).

The government's evidence showed that in September 1964 petitioner met Joan Ansel and her sister, Jean Ortiz (Tr. 24-27). In October 1964, when Joan Ansel left California, she entrusted three diamond rings to petitioner (Tr. 26-27). Subsequently, she asked her sister to have the rings sent (Tr. 28-29).

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[1] "R." indicates the transcript of record, and "Tr." the transcript of trial, both of which are on file with the Clerk of this Court.

On October 20, 1964, petitioner, who was dressed in a policeman's uniform and identified himself as a policeman, told Edward Tully, a postal clerk at the main post office in Van Nuys, California, that he was working under cover on a case and asked if it would be possible to withdraw a package from the mail. Tully told petitioner that under certain conditions packages could be withdrawn; he referred petitioner to Garth Gledhill, assistant postmaster of the Van Nuys office (Tr. 90-91). Petitioner repeated his inquiry to Gledhill, stating that he believed the package in question contained narcotics. Gledhill told petitioner that the package could be withdrawn by the sender, assuming proper identification (Tr. 97-99).

The following day, petitioner brought the rings to Jean Ortiz' house, where they were placed in a small box. The two then proceeded to the police station where petitioner obtained some string and tape for wrapping. After the box was wrapped, petitioner insisted on addressing the package. He inserted Joan Ansel's name as addressee, and inscribed his name as sender, listing Jean Ortiz' post office box number as the return address (Tr. 29-32). The package was then mailed at the Van Nuys main post office (Tr. 33-35, 91-92).

Approximately 30 minutes later, after petitioner had left Jean Ortiz, he telephoned Mr. Gledhill that the package had been mailed and that he would pick it up. In response to questions by Mr. Gledhill, petitioner stated that he was the sender, as indicated

on the return address, and that his address was on Gloria Avenue in Granada Hills.[2] Shortly thereafter, petitioner obtained the package (Tr. 39, 99-103).

On November 4, 1964, petitioner had the rings (which he claimed had come from relatives in the East) appraised by a local jeweler (Tr. 108-115). One of the rings was subsequently sold for $1100; petitioner received the proceeds (Tr. 119-127).

Jean Ortiz subsequently advised the post office that the rings had not been received by her sister (Tr. 36-39). Petitioner was then questioned by postal inspector Stanley Jensen. He admitted withdrawing a package from the mails, but claimed that it contained only bogus identification cards (Tr. 157-158). At first petitioner said that he had returned the package containing the identification cards to the mails; then, that the package was at his home; and, finally, that he threw it away (Tr. 158a).

After petitioner was arrested and released on bail, he admitted to Jean Ortiz that he had taken the rings, and asked that she invoke the Fifth Amendment at his trial (Tr. 42-43).

Petitioner, testifying in his own behalf, claimed that during the time he was dating Jean Ortiz, he was investigating the possible criminal activities of the two sisters;[3] that Jean Ortiz had given him the

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[2] When petitioner picked up the package, he said that he placed Jean Ortiz' post office box number as the return address in error (Tr. 102-103).

[3] Joan Ansel allegedly had told petitioner that her husband was one of the ten most wanted by the F.B.I. (Tr. 129-130).

rings to sell in order to raise some money; and that the package which he had mailed and withdrawn contained only bogus identification cards (Tr. 193-229).

ARGUMENT

1. Petitioner's contention that the facts do not establish a crime against the United States is without merit. Through fraud and deception, petitioner placed his name on the return address solely for the purpose of later withdrawing the package from the mails and of misappropriating the rings contained therein for his personal benefit. No authority to remove the package from the mails was given to petitioner by either Jean Ortiz or Joan Ansel. The court below reasoned (Pet. App. 3): "A review of of the evidence indicates that the jury was entitled to find that McCowan was neither the sender nor the sender's agent with authority to remove the package and had obtained the package from the postal authorities by means of fraud * * *." We emphasize, moreover, that petitioner's intent to misappropriate the property had been formulated in advance of his removing the package from the mails, and that the technique he employed was designed to convince the sisters that the package had gone astray. The statute in terms makes it a federal crime to remove material from the mails with intention to embezzle the same.

The cases relied upon by petitioner—*United States* v. *Logwood*, 360 F. 2d 905 (C.A. 7); *United States* v. *Bullington*, 170 Fed. 121 (N.D. Ala.); and

United States v. *Safford*, 66 Fed. 942 (E.D. Mo.)—are all inapposite. In each, the matter stolen had been either withdrawn by its rightful owner, or received by the proper addressee, prior to the theft. Here, it is clear that the package was actually in the mails at the time of the fraudulent taking.

2. In petitioner's behalf, one Ira Reiner testified to petitioner's good reputation in the community (Tr. 300). On cross-examination, the Assistant United States Attorney asked (Tr. 301):

> Q. Have you heard that Mr. McCowan passed worthless checks in the sum of $12,568.00, and that as a result of this it was a major factor in a man losing his business?

On objection by petitioner, a conference was held outside of the presence of the jury. The court ruled that, notwithstanding the fact that the question was legally permissible (see *Michelson* v. *United States*, 335 U.S. 469), further inquiry in that regard would be prohibited, the court believing it would tend to confuse the jury as to the main issue in the case (Tr. 320-305).[4] The court then instructed the jury to disregard the question (Tr. 305-306). When petitioner put his next witness on the stand and began to inquire again as to the good reputation of petitioner, the Assistant United States Attorney asked (Tr. 309-310):

> Am I to understand that I am to be precluded from going into this area that we discussed be-

[4] No claim is made that the facts underlying the question were untrue.

> fore as to all these character witnesses they are going to put on?

The court advised that the ruling would extend to all the character witnesses, and, upon petitioner's request, again instructed the jury to disregard the statements of the prosecutor (Tr. 309-310).

In the circumstances, petitioner's claim of prejudice is insubstantial. Considering the number of character witnesses testifying in petitioner's behalf, the prosecutor had a legitimate reason for asking whether the ruling forbidding the particular cross-examination extended to all of those witnesses. There is no showing, as petitioner would suggest, that the prosecutor deliberately attempted to insert prejudice into the case, and the jury was adequately instructed to disregard the questions put by counsel. See *Opper* v. *United States*, 348 U.S. 84, 95.

3. The remaining allegations of error raised (Pet. 4-5) but not argued are also without merit. No rights of petitioner were violated when, after petitioner's first trial resulted in a mistrial, the grand jury returning a superseding indictment that charged petitioner in broader language than had the original indictment.[5] The questions asked of petitioner on

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[5] The original indictment specifically charged that petitioner removed from the mails a package containing three diamond rings; the superseding indictment charged only that petitioner removed a package from the mails. Petitioner was not prejudiced by the change, however, since the court in the instant case limited the jury's consideration to whether or not petitioner removed from the mails a package containing three diamond rings (Tr. 504-505).

cross-examination, regarding the length of his legal education, and his romantic relationship with Jean Ortiz, were clearly relevant to his direct testimony. Petitioner had earlier testified that he was a graduate of the Southwestern University Law School (Tr. 190-191), and the prosecutor was merely ascertaining the extent of petitioner's legal education. The inquiry into petitioner's relationship with Jean Ortiz was relevant in showing the falsity of a portion of the defense, namely, that petitioner was working under cover and investigating criminal activity on the part of the sisters.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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